

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DARREN WILLIAMS,

Plaintiff,

-v-

9:09-CV-1258 (NAM/DEP)

DONNA PEPIN, Nurse; KENNETH SCHWENKE,
Corrections Sergeant; LARRY DEUYOUR,
Corrections Officer; and STEPHEN TRAVERS,
Corrections Officer, and MR. PHELIX, Corrections
Captain,

Defendants.

APPEARANCES:

DARREN WILLIAMS
04-A-5841
Marcy Correctional Facility
P.O. Box 3600
Marcy, New York 13403
Plaintiff, *pro se*

HON. ERIC T. SCHNEIDERMAN, Attorney General of the State of New York
ROGER W. KINSEY, ESQ., Assistant Attorney General
The Capitol
Albany, New York 12224
Attorney for Defendants

Hon. Norman A. Mordue, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), brought this *pro se* action under 42 U.S.C. § 1983. In his second amended complaint, (Dkt. No. 42), stemming from incidents occurring in November 2006, he alleges that he was deprived of his civil rights by defendants’ alleged actions, including

deliberate indifference to his medical condition, retaliation, assault, failure to protect, and denial of due process.

Defendant Captain Phelix moves (Dkt. No. 44) to dismiss the claims against him. Plaintiff moves (Dkt. No. 65) for summary judgment in his favor on all claims. Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge David E. Peebles issued a Report and Recommendation (Dkt. No 71) in which he recommends that the Court grant Captain Phelix' dismissal motion and deny plaintiff's motion for summary judgment.

Plaintiff has submitted an objection (Dkt. No. 72). In view of plaintiff's objections, pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducts a *de novo* review. On *de novo* review this Court agrees with Magistrate Judge Peebles that the claims against Captain Phelix must be dismissed on the ground of issue preclusion arising from plaintiff's proceedings in state court.

Further, on *de novo* review, the Court concludes that plaintiff's motion for summary judgment must be denied, because plaintiff has not demonstrated the absence of material questions of fact. Attached to plaintiff's objection is a supplemental affidavit by plaintiff, drafted on January 3, 2012, after he received the Report and Recommendation. While the Court in its discretion may consider such evidence, it declines to do so in this case, because there is no reason why plaintiff could not have included these allegations in his summary judgment motion.

Moreover, the supplemental affidavit merely elaborates on plaintiff's version of the events of November 10, 2006, particularly regarding the conduct of defendant Donna Pepin, and does not eliminate the contradictory factual material in the record. Therefore, even if the Court were to consider the affidavit on this motion, it would not reach a different result. The Court accepts the Report and Recommendation in its entirety.

It is therefore

ORDERED that the Report and Recommendation is accepted; and it is further

ORDERED that Captain Phelix' motion (Dkt. No. 44) is granted and the sixth and seventh causes of action in the second amended complaint and all claims against Captain Phelix are dismissed; and it is further

ORDERED that plaintiff's motion (Dkt. No. 65) for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court is directed to serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: March 29, 2012
Syracuse, New York


Honorable Norman A. Mordue
U.S. District Judge